STATE OF MICHIGAN

COURT OF APPEALS

MARCY K. TRICE,

Plaintiff-Appellant,

v

OAKLAND DEVELOPMENT LIMITED PARTNERSHIP, a/k/a THE SPRINGS APARTMENTS, and THOMAS BALL,

Defendants-Appellees.

UNPUBLISHED
December 16, 2008

No. 278392
Oakland Circuit Court
LC No. 2001-033295-CZ

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff Marcy K. Trice appeals as of right an order dismissing her case against defendants Oakland Development Limited Partnership (a/k/a The Springs Apartments) and Thomas Ball. We affirm, in part, and vacate and remand, in part.

I. Facts and Procedural History

Plaintiff is hypersensitive to various pesticides and other hazardous chemicals and, as a result, she suffers from multiple adverse medical conditions and is fully disabled. On about June 11, 1998, plaintiff moved into apartment 22-108 at The Springs Apartments. Plaintiff asserts that between June 9, 1998, and June 11, 1998, she orally advised defendants that she needed to be warned in advance of any pesticide applications, and that on June 12, 1998, she gave defendants written notice that she needed notice in advance of any pesticide applications. She further asserts that since June 12, 1998, she and her physicians reminded defendants orally and in writing on numerous occasions that she required advanced warning of the type and nature of pesticides or other hazardous chemical that were going to be used adjacent to her building. According to plaintiff, defendants applied various pesticides and other hazardous chemicals at or around her apartment on several occasions without providing her sufficient notice and without providing her with Material Safety Data Sheets for the chemicals that were used. Plaintiff claims that as a result of her exposure to pesticides and other hazardous chemicals while she lived at The Springs Apartments, she:

> has suffered, and will continue to suffer on a permanent basis, exacerbation of previously existing medical conditions (including, but not limited to, asthma, toxic encephalopathy, seizures, lupus, depression and sleep disorder), the creation

of other adverse medical conditions (including, but not limited to, respiratory failure, cataracts and spinal arthritis)[.]

Plaintiff also alleges that defendant apartment complex's negligence or gross negligence in designing, building, repairing and improving the apartment building in which plaintiff lived allowed water to intrude into plaintiff's apartment and cause mold to grow in her apartment. According to plaintiff, she suffered property damage and personal injury as a result of the mold in her apartment.

On July 17, 2001, plaintiff filed a complaint against defendants, alleging that exposure to pesticides, other hazardous chemicals and molds in her apartment caused and exacerbated certain medical conditions.[1] The complaint contained the following counts: negligent failure to warn, negligence/gross negligence, violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*., intentional misrepresentation, innocent misrepresentation, negligent misrepresentation, silent fraud, bad faith promise, violation of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., breach of contract and intentional infliction of emotional distress (IIED). Among other damages, plaintiff sought to recover damages for expenses of remediating mold contamination in her apartment, for ruined personal property, for medical expenses and for mental anguish and emotional distress. Plaintiff also sought to recover damages for "impairment of health, past and future, including but not limited to upper respiratory problems, toxic encephalopathy, seizures, memory problems, dizziness, nausea, joint pain, anxiety and depression, and various other injuries, illnesses and symptoms[.]"

Defendants filed numerous motions before the trial court, and plaintiff raises numerous issues on appeal arising from myriad orders issued by the trial court.

II. Analysis

A. Defendant Thomas Ball's Tort Liability

Plaintiff first argues that the trial court erred in ruling that defendant Ball, who was the manager for defendant apartment complex for approximately the first two years that plaintiff was a tenant at the apartments, was not individually liable for tortious conduct that arose out of his status as agent for the apartment complex. In an order dated August 22, 2003, the trial court granted summary disposition of all plaintiff's claims against defendant Ball. According to the trial court: "Plaintiff's tort theories are also based on duties that arose solely out of his status as agent for the apartment complex. Because of this fact, he cannot be individually liable."

This Court reviews de novo whether a party owes another a duty in a negligence action. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). The threshold

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[1] On July 28, 1992, plaintiff filed a strikingly similar lawsuit against Orkin Exterminating Company, Inc., and her former employer, Detroit Receiving Hospital and University Health Center, making similar claims to the claims she made against defendants in this case. According to plaintiff's brief on appeal, her case against Orkin was settled.

question in a negligence action is whether the defendant owed a duty to the plaintiff; there is no tort liability unless the defendant owed the plaintiff a duty. *Id.*

The trial court erred in ruling that any duty defendant Ball owed plaintiff arose solely out of his status as agent of defendant apartment complex and that defendant Ball was therefore not personally liable to plaintiff. Contrary to the trial court's ruling, an agent may be individually liable for the torts that he or she commits while acting on behalf of the corporation. See *Baranowski v Strating*, 72 Mich App 548, 559-560; 250 NW2d 744 (1976); *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968). "The fact that the tortfeasor was an employee or agent of another person or corporation does not make him immune from suit for his breach of the duty imposed by law." *Burrows v Bidigare/Bublys, Inc*, 158 Mich App 175, 185; 404 NW2d 650 (1987), superseded by statute on other grounds, see *Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367; 494 NW2d 1 (1992).

The trial court also erred in failing to consider whether defendant Ball owed plaintiff a duty without regard to his employment with defendant apartment complex. The failure to perform a contractual duty can give rise to a negligence action if the plaintiff alleges a violation of a duty separate and distinct from the duty assumed under the contract. *Fultz*, *supra* at 461-462. An individual who is not a party to a contract between a premises owner and a maintenance provider does not have a cause of action against the maintenance provider for negligence where the maintenance provider fails to perform a contractual duty unless the defendant owed a duty to the plaintiff that is separate and distinct from the duty imposed under the contract. *Id.* at 469-470. In this case, the trial court did not engage in any analysis regarding whether defendant Ball owed plaintiff a duty that was separate and distinct from any duty that arose from his employment as manager of the apartment complex. Despite the trial court's errors in ruling on this motion, however, we do not reverse the trial court's grant of defendant Thomas's motion for summary disposition because the trial court properly granted summary disposition of plaintiff's negligence claims regarding pesticides and other hazardous chemicals based on plaintiff's failure to establish causation (see *infra*). Therefore, irrespective of the existence of a duty owed by defendant Thomas to plaintiff, summary disposition of plaintiff's tort claim against defendant Thomas was proper based on the lack of the causation element of plaintiff's negligence claim. This Court will not reverse when the trial court reached the right result for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

B. Standard of Review—Causation and Expert Testimony

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). The determination regarding the qualification of an expert, the admission of expert testimony and the trial court's decision whether to hold an evidentiary hearing are also reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). The abuse of discretion standard recognizes "'that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). It is an abuse of discretion to admit

evidence that is not admissible as a matter of law. *Yost*, *supra* at 353. Whether evidence is precluded by statute or court rule is a question of law which this Court reviews de novo. *Id.*

The trial court did not articulate in its order or on the record at the summary disposition hearing on which subrule of MCR 2.116(C) it relied in granting summary disposition. However, the trial court considered documentary evidence outside the pleadings and essentially concluded that there was no genuine issue of material fact regarding plaintiff's ability to establish the causation element of her negligence claims in light of its preclusion of plaintiff's expert scientific evidence. This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007) (*Clerc I*).]

C. Expert Testimony

Plaintiff argues that the trial court erred in making evidentiary rulings regarding the general causation testimony of her mold experts and the specific causation testimony of her pesticide experts.

1. The Mold Expert Testimony—General Causation

In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), the Supreme Court adopted the requirements of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), regarding the admissibility of expert scientific testimony. Under *Daubert* and MRE 702, the trial court must function as a "gatekeeper" in making decisions regarding the admissibility of scientific testimony. *Gilbert*, *supra* at 779, 782. "[T]he exercise of this gatekeeper role is within a court's discretion, [but] a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Id.* at 780, quoting *Kumho Tire Co v Carmichael*, 526 US 137, 158-159; 119 S Ct 1167; 143 L Ed 2d 238 (1999)

(Scalia, J., concurring). The trial court's gatekeeper obligation under MRE 702 is "to ensure that any expert testimony at trial is reliable." *Gilbert*, *supra* at 780. The trial court's "gatekeeper role applies to *all stages* of expert analysis" and "mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from that data." *Id.* at 782 (emphasis in original). "[T]he trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007). The proper role of the trial court "is to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable." *Id.* at 139. "[C]ourts are not in the business of resolving scientific disputes." *Id.* The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted; the inquiry is into whether the opinion is rationally derived from a sound foundation. *Id.* "Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Gilbert*, *supra* at 782-783.

MRE 702 and MCL 600.2955 govern the admissibility of expert scientific testimony. MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MCL 600.2955(1), which the Legislature enacted "in an apparent effort to codify the United States Supreme Court's holding in *Daubert*[,]" *Greathouse v Rhodes*, 242 Mich App 221, 238; 618 NW2d 106 (2000), rev'd in part on other grounds 465 Mich 885 (2001), provides:

> In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
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> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.

> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
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> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
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> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.
>
> (2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

The trial court "'shall' consider all of the factors listed in MCL 600.2955(1)." *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1068; 729 NW2d 221 (2007) (*Clerc II*). While the trial court must consider all seven factors enumerated in MCL 600.2955(1), "the statute does not require that each and every one of those seven factors must favor the proffered testimony." *Chapin*, *supra* at 137. The party offering the expert testimony has the burden of satisfying the preconditions established by MRE 702 and MCL 600.2955(1) and (2).[2] *Gilbert*, *supra* at 781, 789.

In December 2005, defendant apartment complex[3] moved to bar plaintiff from recovering for any personal injuries due to mold exposure and to bar evidence regarding personal injuries

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[2] In her brief on appeal, plaintiff asserts that defendants "offered no evidence or testimony from any of its experts that mold does not *aggravate* allergic or asthmatic-type conditions." This argument demonstrates plaintiff's lack of understanding regarding the burden of proof for the admission of expert testimony. It is true that the party moving for summary disposition has the initial burden of supporting its motion with documentary evidence. In this case, however, the trial court only granted summary disposition after concluding that plaintiff's expert testimony was inadmissible. As the party seeking to admit the testimony, plaintiff, not defendant, had the burden of proving that her experts' testimony was admissible. *Gilbert*, *supra* at 781. Furthermore, the party opposing the admission of expert testimony has no burden to prove a negative—that the expert's opinion is *not* generally accepted. *Craig v Oakwood Hosp*, 471 Mich 67, 81-82 n 40; 684 NW2d 296 (2004). "'This is an unreasonable and thoroughly impractical allocation of the burden of proof.'" *Id.*, quoting *People v Young (After Remand)*, 425 Mich 470, 475; 391 NW2d 270 (1986). Contrary to plaintiff's suggestion, defendants were under no obligation to offer evidence establishing that mold does not cause or exacerbate certain medical conditions.

[3] The trial court granted Defendant Ball's motion for summary disposition of all plaintiff's claims against him in 2003, so this opinion will henceforth use the singular "defendant" to refer to defendant apartment complex.

due to mold exposure under MRE 702, MCL 600.2955 and *Daubert*. The trial court granted defendant's motion, stating on the record:

> Under the Statute [MCL 600.2955] and Court Rule [MRE 702], an expert may offer an opinion if it is based on, quote, "recognized scientific, technical or other specialized knowledge but requires the Court to determine the evidentiary reliability or trustworthiness of the facts and data underlying the testimony before the testimony may be admitted. To determine whether this standard of reliability has been met, the primary inquiry is whether the proposed testimony is derived from "recognized scientific knowledge.", end quote.
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> To be derived from recognized scientific knowledge, the proposed testimony must contain inferences or assertions, the source of which rests in an application of scientific methods. Additionally, the inferences or assertions must be supported by appropriate objective and independent validation based on what is known, in other words, scientific and medical literature. Nelson v American, 273 Mich App 485 (1997). Thus, the admissibility of novel scientific evidence is limited by requiring the party offering such evidence to demonstrate that it has gained general acceptance in the scientific community.
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> Defendant argues that Plaintiff cannot establish that her expert's causation testimony is generally accepted in the scientific community. In support, Defendant cites a review by Drs. Kuhn and Ghannoum who evaluated over 450 publications and concluded that no causal connection between mold exposure and conditions such as those complained of in this case can be established and that studies purportedly reaching contrary conclusions suffer from significant methodological flaws, making their findings inconclusive. This conclusion was also reached by reviewers including the American College of Occupational and Environmental Medicine, the Texas Medical Associations' Council for Scientific Affairs and the National Institite [sic] of Occupational Safety and Health.
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> To dispute this assertion, Plaintiff relies significantly on a publication from the Institute of Medicine titled Damp Indoor Spaces, which discusses an association between exposure to a damp indoor environment and specific respiratory problems as well as an association between the presence of mold and such respiratory problems.
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> Defendant correctly points out, however, that such an association does not rise to the level of proof required for admissible evidence under the Daubert standard. Indeed, the authors of that book explicitly found no scientific evidence sufficient to establish a causal relationship nor do any of Plaintiff's other authorities establish such general acceptance.
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> The Court also agrees that the standard imposed by Daubert, MRE 702 and MCL 600.2955 requires Plaintiff to provide epidemiological studies showing a causal connection between mold exposure and human health effects, in other words, a relative risk of 2.0 or greater with a 95 percent confidence level.

> None of the authorities on which Plaintiff's experts rely meet that standard. . . .
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> In short, the Court agrees that Plaintiff has failed to produce well-substantiated evidence in the scientific community linking the presence of indoor mold to the health problems alleged. Rather, Defendant has established a general acceptance in the scientific community that such a causal connection cannot be established. If so, the causation of Plaintiff's causation experts regarding mold exposure and personal injuries cannot be admissible pursuant to MRE 702 and MCL 600.2955, therefore, Defendant's Motion is granted.

In a subsequent order dated April 24, 2006, the trial court barred plaintiff from presenting evidence that exposure to mold causes neuropsychological injuries and granted summary disposition in favor of defendants on this basis. The trial court observed that plaintiff made the same arguments she made against defendants' previous motion for summary disposition and concluded that the "arguments were insufficient to defeat the previous motion and, therefore, the same arguments are likewise insufficient here."

We find that the trial court applied an incorrect standard for analyzing the admissibility of plaintiff's expert witnesses' scientific testimony. The trial court focused almost exclusively on whether evidence that mold causes health problems in humans had gained general acceptance in the scientific community. This was the proper standard for evaluating the admissibility of novel scientific techniques and principles under the obsolete *Davis-Frye* test. *People v Haywood*, 209 Mich App 217, 221; 530 NW2d 497 (1995). It would also be the correct standard for evaluating the admissibility of novel scientific *methodologies* or novel *forms of* scientific evidence, as distinct from scientific evidence itself. MCL 600.2955(2).

However, the standard in Michigan for evaluating the admissibility of scientific evidence is now the multifaceted inquiry set forth in *Daubert* by the United States Supreme Court. Our Supreme Court adopted this test in *Gilbert*, as did the Legislature by enacting MCL 600.2955(1). See *Greathouse*, *supra* at 238. The trial court "shall" consider the seven nonexhaustive factors set forth in MCL 600.2955(1), of which acceptance in the scientific community is but one. *Clerc II*, *supra* at 1068. Indeed, the trial court has a "fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on 'novel' science—is reliable." *Gilbert*, *supra* at 781 (emphasis in original, footnote omitted). Its "gatekeeper role applies to *all stages* of expert analysis" and "mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data." *Id*. at 782 (emphasis in original). The trial court's limited focus on general acceptance in the scientific community did not constitute the "searching inquiry" that its gatekeeper role required it to conduct under MCL 600.2955(1).

The trial court also erred in concluding that "[d]efendant has established a general acceptance in the scientific community that such a causal connection cannot be established." In making this rather bold conclusion, the trial court relied on an article, proffered by defendants

and written by Drs. D.M. Kuhn and M.A. Ghannoum, entitled *Indoor Mold, Toxigenic Fungi, and Stachybotrys chartarum: Infectious Disease Perspective*.[4] In this article, Drs. Kuhn and Ghannoum assert that while "[i]t has long been postulated that exposure to damp, moldy home and workplace environments has detrimental health effects . . . [t]he causal relationship between damp housing and illness is unclear." *Id.* at 144. The article also discusses the deficiencies in studies that conclude that there is a link between indoor mold and disease: "Most studies describing the health effects of indoor dampness and mold have relied on subjective and retrospective questionnaires. Remarkably few studies have included physical examinations or diagnostic testing. There are obviously potential problems with such an approach . . . ." *Id.* at 147.

The problem with the trial court's conclusion that defendant established that it is generally accepted in the scientific community that a causal connection between indoor mold and human disease cannot be established is twofold. First, such a conclusion attempts to resolve a scientific dispute regarding whether mold causes diseases in humans based on the article by Drs. Kuhn and Ghannoum. This is not the function of the trial court, however. As stated previously, "The courts are not in the business of resolving scientific disputes." *Chapin*, *supra* at 139. "The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation." *Id.* Second, the trial court's conclusion is not a reasonable interpretation of the article by Drs. Kuhn and Ghannoum. The article does not assert that it is not generally accepted in the scientific community that mold causes illness in humans. To the contrary, Drs. Kuhn and Ghannoum conclude that there is a dearth of unflawed studies regarding whether indoor mold causes human disease and that there is a need for objective studies to address the issue of mold-related illness:

> Valid concerns exist regarding the relationship between indoor air, mold exposure, mycotoxins, and human disease. Review of the available literature reveals certain fungus-disease associations, including ergotism, ATA from *Fusarium*, and liver disease from *Aspergillus* species (382). However, while many studies suggest a similar relationship between *Stachybotrys* and human disease, these studies nearly uniformly suffer from significant methodological flaws, making their findings inconclusive. As a result, we have not found supportive evidence for serious illness due to *Stachybotrys* exposure in the contemporary environment. Our conclusion is supported by several other recent reports . . . . To address issues of indoor mold-related illness, there is an urgent need for studies using objective markers of illness, relevant animal models, proper epidemiologic techniques, and careful examination of confounding factors including bacteria, endotoxin, man-made chemicals, and nutritional factors. [*Id.* at 164.]

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[4] *Indoor Mold, Toxigenic Fungi, and Stachybotrys chartarum: Infectious Disease Perspective*, Kuhn & Ghannoum, Clinical Microbiology Reviews, Jan. 2003, pp 144-172.

The trial court concluded that it is generally accepted in the scientific community that a causal connection between indoor mold and human disease cannot be established. However, Drs. Kuhn and Ghannoum's article does not state this. Furthermore, the article does not dispute that there is a causal effect between indoor mold and human illness or assert that such a causal effect does not exist or cannot be established; rather, the authors conclude that further objective studies are needed to make this determination. Drs. Kuhn and Ghannoum's conclusion that there is an urgent need for more objective studies regarding the issue of indoor mold and human illness underscores the notion that "science is, at its heart, itself an ongoing search for truth, with new discoveries occurring daily . . . ." *Chapin*, *supra* at 139. By concluding that a causal connection between indoor mold and human disease cannot be established, the trial court was getting ahead of the science. As this Court recognized in *Chapin*, however, "[t]he courts are unlikely to be capable of achieving a degree of scientific knowledge that scientists cannot." *Id.* The trial court erred in purporting to resolve a scientific dispute that had not been resolved by scientists. *Id.*

The trial court further erred in requiring plaintiff "to provide epidemiological studies showing a causal connection between mold exposure and human health effects, in other words, a relative risk of 2.0 or greater with a 95 percent confidence level." In ruling that plaintiff's scientific testimony was inadmissible, the trial court stated: "None of the authorities on which Plaintiff's experts rely meet that standard." The trial court did not cite to any Michigan case law that requires a proponent of scientific evidence regarding causation to provide epidemiological studies, and we do not believe that such case law exists. However, there is federal case law addressing this issue. In *Gass v Marriott Hotel Services, Inc*, 501 F Supp 2d 1011 (WD Mich, 2007), the United States District Court for the Western District of Michigan stated: "'[u]nder the *Daubert* standard, epidemiological studies are not necessarily required to prove causation, as long as the methodology employed by the expert in reaching his or her conclusion is sound.'" *Gass*, *supra* at 1019, quoting *Benedi v McNeil-PPC, Inc*, 66 F3d 1378, 1384 (CA 4, 1995). Furthermore, it may be that in some areas, epidemiological studies or medical or scientific literature do not yet exist to support a scientific theory. This fact alone should not preclude the admission of scientific testimony and automatically bar a plaintiff from recovering. As this Court recently stated in *Unger*, an expert's

> inability to specifically identify any medical or scientific literature to support his conclusions . . . does not necessarily imply that his opinions were unreliable, inadmissible, or based on "junk science." Indeed, it is obvious that not every particular factual circumstance can be the subject of peer-reviewed writing. There are necessarily novel cases that raise unique facts and have not been previously discussed in the body of medical texts and journals. [*Unger*, *supra* at 220.]

While epidemiological studies certainly could help to establish the reliability of causation evidence, plaintiff was not required to provide such epidemiological studies to sustain her burden of proving that her proposed expert testimony was reliable. The trial court erred in requiring plaintiff to provide such studies.

In sum, the trial court erred in several respects in its ruling regarding the admissibility of plaintiff's expert testimony regarding whether mold causes disease in humans. We therefore vacate the trial court's preclusion of plaintiff's expert causation testimony as well as the trial court's grant of summary disposition for defendant based on the preclusion of the expert testimony, and we remand for the trial court to re-evaluate the admissibility of plaintiff's expert

causation testimony under *Daubert*, MRE 702 and MCL 600.2955(1). While a *Daubert* hearing is not required every time scientific evidence is opposed, the trial court shall hold such a hearing if it will assist the trial court in conducting a sufficiently searching inquiry under *Daubert*, MRE 702 and MCL 600.2955(1) to ascertain the reliability of plaintiff's experts' testimony.

2. The Pesticide Expert Testimony—Specific Causation

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition of her claims regarding chemical exposure based on her inability to establish specific causation.

In December 2005, defendant apartment complex moved for summary disposition under MCR 2.116(C)(10) of all plaintiff's claims requiring that plaintiff's symptoms or illnesses be caused by plaintiff's alleged exposure to harmful chemicals used by defendant. Defendant argued that evidence of plaintiff's exposure to such chemicals must be precluded under *Daubert*, MRE 702, MRE 703 and MCL 600.2955 and that summary disposition of plaintiff's claims regarding chemical exposure was proper because without such evidence, plaintiff would be unable to establish specific causation. In granting defendant's motion, the trial court stated:

> Defendant also seeks summary disposition of Plaintiff's claims regarding chemical exposure based on her inability to establish a specific causation.
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> * * *
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> In terms of the substance of the Motion, Defendant acknowledges that Plaintiff can identify the chemicals that were used while she lived at Defendant's apartment complex and when they were used. Plaintiff cannot, however, identify the amount applied, the location of application or the weather conditions at the time of application nor did Plaintiff ever undergo any biological testing for chemical content in her blood, urine or breath. Rather, Plaintiff can establish no more than a temporal association between the use of chemicals and her complaints. Thus, Plaintiff cannot meet the standards imposed by MRE 702 and MCL 600.2955, thereby precluding admission of her expert's causation testimony and, consequently, her claims based on chemical exposure.
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> In response, Plaintiff does not dispute that she cannot establish either the dose or duration of her exposure to the chemicals. Rather, her experts attempt to establish causation with a differential diagnosis. Specifically, Dr. Kelly's reports simply do not explain how he could rule out other potential causes, such as Plaintiff's Lupus and Epstein-Barr syndrome, both of which involve symptomology similar to that alleged by Plaintiff nor do these reports rule out psychosomatic causes or previous exposures to pesticides. These conclusions simply do not meet the standard of scientific rigor sufficient to establish a proper differential diagnosis, therefore, this motion is also granted.

Even assuming that plaintiff's expert witnesses were qualified under *Daubert*, MRE 702 and MCL 600.2955(1) to testify regarding specific causation, for reasons that will be explained more thoroughly below, plaintiff was unable to establish that she was exposed to any harmful

chemicals whatsoever. Thus, plaintiff could not establish a genuine issue of material fact regarding whether exposure to chemicals was the specific cause of the exacerbation of her injuries or symptoms. The trial court therefore properly granted defendant's motion for summary disposition of plaintiff's claims regarding chemical exposure based on plaintiff's inability to establish specific causation.

There are two levels of causation: general causation and specific causation. With general causation, the issue is whether the chemicals were capable of causing the plaintiff's medical conditions, whereas with specific causation, the issue is whether the chemicals did in fact cause the plaintiff's specific medical conditions. See *Kelley v American Heyer-Schulte Corp*, 957 F Supp 873, 875 (WD Tex, 1997); *Hall v Baxter Healthcare Corp*, 947 F Supp 1387, 1412-1413 (D Or, 1996). Thus, to prove causation in a toxic tort case,[5] the plaintiff must show (1) that the alleged toxin was capable of causing injuries like those suffered by the plaintiff (general causation) and (2) that the toxin was the cause of the plaintiff's injury (specific causation). *Gass*, *supra* at 1023.

Federal case law has held that evidence that the plaintiff was exposed to a chemical, at a level that is harmful, is required to establish specific causation in a toxic tort case. "'[S]cientific knowledge of the harmful level of exposure to [an agent], plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiff's burden in a toxic tort case.'" *Cano v Everest Minerals Corp*, 362 F Supp 2d 814, 837 (WD Tex, 2005), quoting *Allen v Pennsylvania Engineering Corp*, 102 F3d 194, 199 (CA 5, 1996). See also *McClain v Metabolife Internat'l, Inc*, 401 F3d 1233, 1241 (CA 11, 2005) ("[T]o carry the burden in a toxic tort case, "a plaintiff must demonstrate 'the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover[.]'"" (citation omitted)). While precise evidence concerning the exposure necessary to cause specific harm to humans and exact details regarding the plaintiff's exposure are not always available or necessary, a plaintiff must make some threshold showing that she was exposed to toxic levels known to cause the types of symptoms she has suffered. *Gass*, *supra* at 1024. In this case, however, plaintiff fails to meet even this basic threshold showing. In her complaint, plaintiff alleged that she was exposed "to pyrethrin-based insecticides, other pesticides and hazardous substances" while she lived in defendant's apartment complex. However, all of plaintiff's experts[6] acknowledged that the dose of chemicals to which plaintiff had been exposed had not been determined, either through blood, urine, dermal contact or exhaled breath testing analysis, or stated that they were not aware if such testing had been done. Furthermore, plaintiff herself acknowledged that she was not aware of any studies of the quantity or duration of any exposure she may have had to any harmful chemicals. Without such testing, it is not certain that plaintiff was exposed to harmful chemicals at all, let alone that she was exposed to chemicals at a dosage or level that would be harmful. At

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[5] A plaintiff's claim that she has suffered medical complications as a result of her exposure to a toxic substance is known as a toxic tort claim. *Gass*, *supra* at 1022.

[6] Plaintiff's experts in this area were Dr. R. Michael Kelly, Robert K. Simon, Ph.D., and Connie Morbach.

the very least, plaintiff was required to present evidence that she was exposed to some chemical at some level. Without any testing of her body, there was no evidence that plaintiff was exposed to such chemicals at all, let alone evidence of the dose or level of any chemical to which she may have been exposed. In the absence of such evidence, plaintiff was unable to establish that any exposure to harmful chemicals specifically caused her symptoms. Thus, the trial court properly dismissed plaintiff's claims regarding her exposure to harmful chemicals.

Plaintiff argues that she established specific causation through the testimony of Dr. R. Michael Kelly. According to plaintiff, Dr. Kelly used a differential diagnosis to establish specific causation. "Differential diagnosis is considered a near universal technique to determine the specific cause of disease, defined as a physician's consideration of alternative diagnoses that may explain a patient's condition." *Cano*, *supra* at 838. "[D]ifferential diagnosis . . . is simply a method by which all possible causes of a condition are listed and then the various causes are ruled out so as to leave the most likely cause or causes of a particular patient's problem." *Dengler v State Farm Mutual Ins Co*, 135 Mich App 645, 649; 354 NW2d 294 (1984). We need not address plaintiff's arguments regarding whether Dr. Kelly's differential diagnosis was sufficient to establish specific causation, however, because without evidence that plaintiff was actually exposed to a chemical at all and that the exposure was at a level that is harmful, plaintiff cannot establish that exposure to a chemical actually caused her any harm. It is therefore unnecessary to ascertain whether plaintiff's expert sufficiently ruled out other possible causes of plaintiff's medical condition using a differential diagnosis.

Plaintiff also argues that in moving for summary disposition, defendant failed to provide any affidavits, depositions or other documentary evidence to establish an issue of material fact. Thus, plaintiff argues, the burden never shifted to plaintiff to present any documentary evidence, and this Court should reverse the trial court's grant of summary disposition under MCR 2.116(C)(10). Plaintiff is correct that the party moving for summary disposition has the initial burden of supporting its position with documentary evidence and that if the moving party so supports its position, the burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Quinto*, *supra* at 362; see also MCR 2.116(G)(3) and (4). In this case, defendant attached the following to its motion for summary disposition: plaintiff's complaint, an excerpt of the deposition of R. Michael Kelly, M.D., an excerpt of the testimony of Robert K. Simon, Ph.D., an excerpt of the testimony of Connie Morbach, and an excerpt of plaintiff's deposition testimony. Furthermore, in its reply brief, defendant attached additional documentary evidence. Plaintiff's contention that defendant failed to provide documentary evidence to support its motion for summary disposition is therefore without merit.

In sum, the trial court properly ruled that without evidence that plaintiff had been exposed to any chemicals at a level that would be harmful, plaintiff could not establish specific causation. The trial court therefore properly granted defendant's motion for summary disposition because there was not a genuine issue of material fact regarding whether exposure to harmful chemicals was the specific cause of plaintiff's medical conditions.

D. Michigan Consumer Protection Act

Plaintiff argues that the trial court erred in dismissing her MCPA claims under MCL 445.903(1)(c), (e), (s), and (y). Plaintiff also argues that the trial court erred in denying her

motion to amend her complaint to assert an MCPA violation based on the fact that defendant leased her a different apartment than the apartment that she was shown.

This Court reviews a trial court's denial of a motion to amend a complaint for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Under MCR 2.118(A)(2), leave to amend pleadings should be freely given when justice so requires. However, leave to amend may be denied for particularized reasons, such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to the opposing party, or when an amendment would be futile. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000).

The MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce. MCL 445.903(1). "Trade or commerce" is defined as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property . . . ." MCL 445.902(1)(g). The intent of the MCPA is to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes. *Zine v Chrysler Corp*, 236 Mich App 261, 271; 600 NW2d 384 (1999). "The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000), rev'd in part on other grounds sub nom *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007). "In determining whether an action is proper under the MCPA, courts must examine the nature of the conduct complained of case by case and determine whether it relates to the entrepreneurial, commercial, or business" aspects of the defendant's profession. *Nelson v Ho*, 222 Mich App 74, 84; 564 NW2d 482 (1997).

MCL 445.903 provides, in relevant part:

> (1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:
>
> * * *
>
> (c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.
>
> * * *
>
> (e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
>
> * * *

> (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.
>
> * * *
>
> (y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.

We find that the MCPA is not applicable to the facts of this case. We reach this conclusion not, as the trial court improperly concludes, because the MCPA does not apply to a lease. In fact, "[t]rade or commerce" as used in the MCPA includes real property leases. MCL 445.902(1)(g); *Lesatz v Standard Green Meadows*, 164 Mich App 122, 128; 416 NW2d 334 (1987). Therefore, the MCPA can apply to a lease if the lease is primarily for personal or household use. In this case, however, plaintiff is not alleging that the lease provisions violate the MCPA. Cf. *Lesatz, supra*. Rather, plaintiff alleges that defendants' conduct regarding the application of pesticides and other hazardous chemicals on the grounds of the apartment complex and failure to provide plaintiff with notice of such applications violates the MCPA. The MCPA applies only to purchases by consumers. *Slobin v Henry Ford Health Care*, 469 Mich 211, 216; 666 NW2d 632 (2003). In this case, defendants, not plaintiff, either purchased the pesticides or chemicals for business or commercial purposes associated with maintaining its apartment or contracted with an entity to provide such services. If an item is purchased for business or commercial rather than personal purposes, the MCPA does not supply protection. *Id.* at 217. Defendants' conduct regarding applying and warning about the use of pesticides and other hazardous chemicals is not "[t]rade or commerce" within the act because defendants were not in the business of selling or applying pesticides and hazardous chemicals. Rather, defendants' conduct regarding the application and warning of pesticides and other hazardous chemicals was incidental to its operation of the apartment facility.

The purpose of the MCPA is to prohibit unfair practices in trade or commerce. *Forton, supra* at 715. Allowing plaintiff to proceed under the MCPA would not achieve the MCPA's intended goal of prohibiting unfair practices in trade or commerce because defendants' conduct of obtaining and applying pesticides and other dangerous chemicals or contracting for such services was for defendants' business or commercial purposes, and not for any personal purpose. Therefore, the trial court properly granted summary disposition of plaintiff's MCPA claims as a matter of law.

Furthermore, because the MCPA does not apply to the facts of this case, any attempt by plaintiff to amend her complaint to add another MCPA claim would have been futile. *Sands, supra* at 239-240. Thus, the trial court did not abuse its discretion in denying plaintiff's motion to amend her complaint to add an MCPA claim based on the fact that defendants leased her a different apartment than the apartment that she was shown.

E. Persons with Disabilities Civil Rights Act

Plaintiff argues that her claim that defendants violated the PWDCRA should be reinstated. According to plaintiff, "[r]eversal on the chemical exposure motion should result in a

reversal on this issue." Because we have concluded that the trial court properly ruled that plaintiff failed to establish specific causation for her chemical exposure claims and properly granted defendant apartment complex's motion for summary disposition of those claims, plaintiff's argument in this regard must be rejected. We further note that plaintiff's argument for this issue is contained in a single paragraph with no citation to legal authority. Plaintiff has abandoned this issue by failing to adequately brief the issue:

> 'It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.' [*Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

F. Plaintiff's Claims based on Future Promises

Plaintiff argues that the trial court erred in dismissing some of her misrepresentation, fraud and MCPA claims on the grounds that a promise to do something in the future cannot form the basis of a fraud or misrepresentation claim.

On June 30, 2003, the trial court dismissed plaintiff's remaining misrepresentation, fraud and bad faith claims. The trial court ruled that a promise to do something in the future could not form the basis of a fraud or misrepresentation claim. The trial court also ruled that plaintiff had not presented sufficient evidence to warrant application of the bad faith exception. On November 29, 2006, the trial court dismissed plaintiff's claim for violation of MCL 445.903(1)(bb) and (cc).[7] The trial court stated that the conduct alleged was not actionable unless plaintiff could provide evidence that defendants did not intend to honor their promises at the time they were made. Because the record was devoid of such evidence, the trial court granted summary disposition of the MCPA claims.

An action for fraudulent misrepresentation must be predicated upon a statement of past or existing fact. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993). A promise of something to be done in the future is contractual in nature and is not a representation of existing fact that can support a claim of actionable fraud. *Id.*; see also *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005). However, there is a bad-faith exception to this rule; under this exception, "fraudulent misrepresentation may be based upon a promise made in bad faith without intention of performance." *Hi-Way Motor Co v Internat'l*

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[7] The MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce, including "[m]aking a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is[,]" MCL 445.903(1)(bb), and "[f]ailing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner." MCL 445.903(1)(cc).

Harvester Co, 398 Mich 330, 337-338; 247 NW2d 813 (1976). Under the bad faith exception, evidence of fraudulent intent must relate to conduct of the act "at the very time of making the representations, or almost immediately thereafter[.]" *Danto v Charles C Robbins, Inc*, 250 Mich 419, 425; 230 NW 188 (1930). There is also a "false token" exception to the general rule that broken promises of future conduct is not actionable fraud. *Hi-Way Motor Co*, *supra* at 339. "This exception pertains where, although no proof of the promisor's intent exists, the facts of the case compel the inference that the promise was but a device to perpetrate a fraud." *Id.* The false token exception has been interpreted to apply only where there is a fiduciary relationship. *Id.*

Any promise by defendants to give plaintiff notice in advance of pesticide application, as well as information regarding the type and nature of the pesticide, is a promise to do something in the future and therefore cannot support plaintiff's fraud and misrepresentation claims or plaintiff's MCPA claims that related to defendants' alleged fraudulent conduct. *Marrerro*, *supra* at 444. Moreover, the exceptions to the general rule that an action for fraudulent misrepresentation must be predicated upon a statement of past or existing fact do not apply in this case. Plaintiff does not argue that the bad-faith exception applies. Plaintiff does, however, argue that the "false-token" exception applies, although plaintiff improperly characterizes this single exception as two separate exceptions. According to plaintiff, there were "numerous occasions" in which defendants informed plaintiff regarding a pesticide application and then either did not apply the pesticide as they said they would or applied pesticide that was either more or less toxic than the notice had indicated. Plaintiff fails to cite any specific evidence to support her claims. A party may not simply assert an error and then leave it up to this Court to search for authority to sustain or reject his position. *Mitcham*, *supra* at 203. Furthermore, there does not appear to be any evidence that compels the inference that any promise made by defendants was a device to perpetrate a fraud. Moreover, the "false-token" exception only applies if there is a fiduciary relationship between the parties. *Hi-Way Motor Co*, *supra* at 339. Although it is perhaps arguable that plaintiff and defendant apartment complex, as landlord and tenant, were in a fiduciary relationship, defendant Ball was the manager of the apartment complex who actually supplied the notices to plaintiff, and there was no fiduciary relationship between plaintiff and defendant Ball. Thus, the "false-token" exception does not apply.

G. Negligent Infliction of Emotional Distress (NIED)

Plaintiff argues that her NIED claim should be allowed to go forward because she alleged NIED in her complaint. In the alternative, plaintiff argues that the trial court abused its discretion in not allowing her to amend her complaint to add a NIED claim.

Plaintiff's complaint contained a claim for IIED, but did not contain a claim for NIED. In ruling on defendant's motion for summary disposition of plaintiff's IIED claim, the trial court, unaware that plaintiff's complaint did not contain a NIED claim, mistakenly stated that plaintiff's NIED claim should survive. The trial court subsequently explained the nature of its confusion in this regard as follows:

> Plaintiff's complaint originally included a count for *intentional* infliction of emotional distress. That claim was dismissed in Defendant's 2003 summary disposition motion, as the allegations alleged simply did not describe conduct sufficiently outrageous to justify recovery. Plaintiff moved for reconsideration of that ruling, arguing that she was also pursuing a claim of negligent infliction of

> emotional distress, and that theory was not challenged in Defendant's motion. In making this argument, however, Plaintiff failed to acknowledge that her complaint did not plead such a count. Nor did this fact come to the Court's attention via Defendant's opposition to the motion, since Plaintiff made the assertion in a motion for reconsideration, for which no response is permitted. As a result, the court denied the motion for reconsideration in February 2004, but agreed that the negligent infliction of emotional distress claim survived because "Defendants did not address these allegations in their initial motion." After receiving that ruling, Plaintiff never requested to formally amend her complaint, at least not until the filing [of] her response to the current motion in April 2006. In this context, the Court finds undue delay in Plaintiff's failure to request leave to add this claim earlier and, therefore, this theory of liability shall not be pursued in this action.

Plaintiff's complaint clearly did not contain a claim for NIED. Although the trial court at one point erroneously believed that plaintiff's complaint did contain a claim for NIED, it subsequently recognized its mistake. Plaintiff argues on appeal that the complaint contained allegations of NIED, but does not cite what paragraphs in the complaint support her assertion. This Court will not search plaintiff's complaint for allegations that could conceivably constitute or support a claim for NIED, when plaintiff herself has not made any efforts in this regard. Plaintiff may not simply assert an error and leave it up to this Court to discover and rationalize the basis for her claims and then search for authority to sustain her position. *Mudge*, *supra* at 105. Plaintiff also argues that "the trial court abused its discretion in not allowing Plaintiff to formally amend her Complaint under the circumstances." However, plaintiff's argument in this regard amounts to one sentence with no citation to legal authority. Again, plaintiff has abandoned this issue on appeal by failing to detail her argument in this regard or support her argument with citations to the record or legal authority. *Id.*

H. Emotional Distress Damages

Plaintiff argues that the trial court erred in restricting her ability to recover emotional distress damages in connection with her fraud and negligence claims.

On April 24, 2006, the trial court ruled: "Plaintiff cannot recover any damages for "embarrassment" or "mortification," and cannot recover emotional distress damages under any theory of liability except the Persons With Disabilities Civil Rights Act and Consumer Protection Act."

The trial court properly dismissed plaintiff's fraud and misrepresentation claims on the grounds that a promise to do something in the future cannot form the basis of a fraud or misrepresentation claim. Therefore, there are no fraud or misrepresentation claims upon which plaintiff can base a claim for recovery of damages for emotional distress.

For reasons explained above, the trial court also properly dismissed plaintiff's negligence claims based on plaintiff's failure to establish causation. To establish a prima facie case of negligence a plaintiff most show that the defendant owed a duty to the plaintiff, that the defendant breached that duty, that the defendant's breach of its duty was the proximate cause of the plaintiff's injury, and that the plaintiff suffered damages. *Koester v VCA Animal Hosp*, 244

Mich App 173, 175; 624 NW2d 209 (2000). Actual damages in tort cases can include compensation for mental distress and anguish. *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 251; 531 NW2d 144 (1995). Furthermore, emotional damages may be awarded even in the absence of physical consequences to the plaintiff. See *id*. However, in this case, because plaintiff was unable to establish causation, she failed to establish a prima facie case of negligence. Furthermore, plaintiff failed to plead a claim of NIED, and the trial court dismissed her claim of IIED. Without any proof of wrongful conduct, plaintiff cannot establish that she was entitled to damages for emotional distress. There is no negligence claim upon which plaintiff can base a claim for recovery of damages for emotional distress.

I. Personal Property Damages

Plaintiff argues that the trial court erred in granting summary disposition of her claim for personal property damages. The trial court granted summary disposition of this claim under MCR 2.116(C)(10).

In her complaint, plaintiff alleged that defendants negligently allowed water to intrude into her apartment, which caused mold that damaged her property (as well as caused her personal injury). Plaintiff sought to recover damages for "contamination of her personal property and expenses incurred in trying to remediate" the property. The trial court granted defendant's motion for summary disposition of her claim for personal property damages. In dismissing plaintiff's personal property damage claim, the trial court stated:

> Plaintiff's evidence regarding mold contamination on the walls and on three items of property is not sufficient to support a finding that the remainder of the property in the residence (none of which showed signs of visible mold or was tested for the presence of mold) was contaminated. Moreover, even if such items had mold on them, Plaintiff's evidence is insufficient to establish that the extent of the contamination required that the property be remediated and/or destroyed. Therefore, summary disposition of this claim is appropriate pursuant to MCR 2.116(C)(10).

Plaintiff's argument for this issue is not really a legal argument at all. She cites no legal authority whatsoever. Plaintiff's argument is essentially a summary of the evidence that she apparently believes establishes that her apartment and personal property were contaminated by mold. In light of plaintiff's failure to make a legal argument or cite any legal authority, we find that plaintiff has abandoned this issue. Plaintiff may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims. *Mudge*, *supra* at 105.

J. Statute of Limitations

Plaintiff finally argues that the trial court erred in ruling that claims of misrepresentation, silent fraud and bad faith promise that occurred before the filing of plaintiff's lawsuit were barred by the statute of limitations. Although plaintiff raised this issue in her statement of questions presented, she did not address the merits of the issue in her appellate brief. Her failure to brief the issue constitutes abandonment of the issue on appeal, and we therefore will not address it. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002).

III. Conclusion

We vacate the trial court's preclusion of plaintiff's expert testimony regarding whether mold causes human disease and grant of summary disposition in favor of defendant apartment complex based on the preclusion of the expert testimony, and remand for the trial court to conduct a proper inquiry regarding the admissibility of plaintiff's expert testimony regarding whether mold causes human disease. On remand, the trial court shall hold a *Daubert* hearing if it will assist the court in conducting a sufficiently searching inquiry under *Daubert*, MRE 702 and MCL 600.2955(1) to ascertain the reliability of plaintiff's experts' testimony. In all other respects, the trial court's rulings are affirmed, although not always for the reasons articulated by the trial court.

Affirmed, in part, and vacated and remanded, in part. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis